

## **POTPOURRI**

**Department of Environmental Quality  
Office of Environmental Assessment  
Environmental Planning Division**

**Notice Of Opportunity  
For Public Comment On Proposed  
Settlement Agreement Between  
The United States Environmental Protection Agency,  
The Louisiana Department Of Environmental Quality,  
The Louisiana Environmental Action Network, North Baton Rouge Environmental  
Association, Save Our Lakes And Ducks, And The Southern University  
Environmental Law Society  
(0106Pot2)**

The Louisiana Department of Environmental Quality, the United States Environmental Protection Agency, Louisiana Environmental Action Network, North Baton Rouge Environmental Association, Save Our Lakes And Ducks, and the Southern University Environmental Law Society have agreed to a proposed settlement agreement in the matter entitled Louisiana Environmental Action Network, et al., v. the United States Environmental Protection Agency, Case # No. 99-60570 in the United States Court of Appeals For the Fifth Circuit. The case seeks judicial review of the approval by the US EPA of revisions to the Louisiana State Implementation Plan (SIP) containing an "attainment demonstration" and "Post-15% Rate of Progress" required by the Clean Air Act Amendments of 1990.

The Department of Environmental Quality will accept comments on the proposed settlement until 4:30 p.m., Friday, July 13, 2001. The public is invited and encouraged to submit written comments to the Department of Environmental Quality, Legal Division, Box 82282, Baton Rouge, Louisiana 70884-2282, Attention: Donald Trahan, Legal Division. All comments received by the department prior to the close of the comment period will be considered by the Department in reaching a decision on whether to make the settlement final.

The Proposed Settlement is available for inspection from 8 a.m. until 4:30 p.m. at the Department of Environmental Quality Main Office, 7290 Bluebonnet Boulevard, 4th Floor (Public Records Room, Room 4400), Baton Rouge, LA 70810. The proposed settlement is also available on the DEQ website at <http://www.deq.state.la.us/planning/regs/index.htm>.

For further information, you may call Donald Trahan with the Legal Division of the Department of Environmental Quality at (225) 765-0236.

James H. Brent, Ph.D.  
Assistant Secretary

## **SETTLEMENT AGREEMENT**

WHEREAS, on August 30, 1999, four environmental groups, consisting of Louisiana Environmental Action Network, North Baton Rouge Environmental Association, Save Our Lakes and Ducks, and Southern University Environmental Law Society, represented by Tulane Environmental Law Clinic (collectively, “Petitioners”), petitioned for judicial review of a final rule (“the Rule”) promulgated by the United States Environmental Protection Agency (“EPA”) on July 2, 1999, published at 64 Fed. Reg. 35,930, approving the revised Post-1996 Rate-of-Progress (“ROP”), Attainment Demonstration, and Contingency Measures State Implementation Plans for the Baton Rouge Ozone Nonattainment Area (the “1999 Approved SIP”), submitted by the State of Louisiana, through its Department of Environmental Quality (“LDEQ”), pursuant to the Clean Air Act (the “Act”);

WHEREAS, the Petitioners raised issues in the petition regarding whether EPA properly approved the 1999 Approved SIP, challenging: (a) EPA’s approval of the Post-1996 Rate of Progress plan for Baton Rouge; (b) EPA’s approval of the demonstration of attainment for Baton Rouge; and (c) EPA’s approval of the contingency measures for Baton Rouge;

WHEREAS, the petition was filed in the Fifth Circuit Court of Appeals and assigned docket number 99-60570 (“this Action”);

WHEREAS, under sections 172(c)(9) and 182(c)(9) of the Act, 42 U.S.C. §§ 7502(c)(9) and 7511a(c)(9), many States, including Louisiana, must submit contingency measures to be implemented if reasonable further progress toward attainment is not achieved or if the air quality standard is not attained by the applicable attainment date;

WHEREAS, Louisiana elected to develop a contingency measure plan using Emission Reduction Credits (“ERCs”) held in escrow in the Louisiana Emission Reduction Credit Bank (the “Louisiana ERC Bank”), established pursuant to Louisiana’s banking rule, set forth in Title 33 of the Louisiana Administrative Code, Chapter 6;

WHEREAS, one issue raised by Petitioners was whether the ERCs held in escrow in the Louisiana ERC Bank are adequate to meet requirements for contingency measures;

WHEREAS, EPA interprets the Act as requiring that valid ERCs must be based on emissions reductions that are surplus of all emission reductions required under the Act, including emission reductions used to demonstrate attainment of the National Ambient Air Quality Standard for ozone, at time of their use;

WHEREAS, new information has recently come to the attention of the EPA that Louisiana's banking rule, and LDEQ's application of that rule, might not be consistent with EPA regulations and guidance, because LDEQ informed EPA that it did not interpret the Act to require emission reductions to be discounted to reflect all emission reductions required under the Act, at time of their use;

WHEREAS, LDEQ informed EPA that it did not discount ERCs in the Louisiana ERC Bank at time of their use to reflect requirements of the Act arising after deposit of ERCs;

WHEREAS, based on this new information, together with new information concerning difficulties accessing data pertaining to the Louisiana ERC Bank and insufficiencies in the banking database, on October 6, 2000, the Parties filed a joint motion for a partial voluntary remand of this Action as it relates to EPA's approval of Louisiana's contingency measure plan for the Baton Rouge ozone nonattainment area, and for a stay of all proceedings in this Action, including oral argument scheduled for November 8, 2000 (the "joint motion");

WHEREAS, on October 19, 2000, the Court granted the joint motion;

WHEREAS, in response to the voluntary remand of EPA's approval of the contingency measures for the Baton Rouge ozone nonattainment area (the "voluntary remand"), EPA is considering what further action or rulemaking is appropriate;

WHEREAS, the Parties to this Settlement Agreement are LDEQ, the Petitioners, and the United States on behalf of EPA;

WHEREAS, this Settlement Agreement serves as the final settlement between the Parties, subject to public notice and comment requirements under section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). The Agreement derives from lengthy and productive negotiations among the Parties;

WHEREAS, settlement of all issues raised in the Action pending in this Court is in the best interests of the public, the Parties, and judicial economy;

WHEREAS, the Parties have agreed to a settlement of these matters to avoid expensive and protracted litigation and without any adjudication or admission of fact or law by any Party;

NOW THEREFORE, LDEQ, the Petitioners, and the United States on behalf of EPA, intending to be bound, agree as follows:

1. Within five (5) days after this Settlement Agreement becomes effective pursuant to Paragraph 9 hereunder, the Tulane Environmental Law Clinic (on behalf of all Petitioners) will file a motion to dismiss this Action in its entirety, with prejudice to its refiling.

2. The dismissal of this Action by Petitioners shall not serve as a waiver or relinquishment of any rights they may have under the Act.

3. EPA and LDEQ has met and/or will meet with representatives from Petitioners to discuss the proper modeling and attainment protocols to calculate and assess the attainment demonstration in a revised State Implementation Plan (the “revised SIP”) for the Baton Rouge Ozone Nonattainment Area, including ozone transport analyses and any expected exceedance factor.

4. The Parties may extend the date set forth in Paragraph 1 of this Settlement Agreement, or otherwise modify this Settlement Agreement, by written stipulation executed by counsel for each of the Parties.

5. The commitments in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA or LDEQ obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or State law.

6. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA under the Clean Air Act or by general principles of administrative law.

7. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or revise the regulations identified in this Settlement Agreement from time to time, or to promulgate superseding regulations.

8. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims, or defenses it may have.

9. The Parties agree and acknowledge that final approval of this Settlement Agreement is subject to the requirements of section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). That section requires that the Administrator of EPA provide notice of any proposed settlement agreement in the *Federal Register* and provide a period of at least 30 days following publication to allow persons who are not Parties or intervenors in the litigation to comment in writing. The Administrator or the Attorney General, as appropriate, must consider those comments and may withdraw or withhold consent to the Settlement Agreement if the comments disclose facts or considerations which indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. This Settlement Agreement shall become effective on the date that EPA provides written notice to the Parties that the aforementioned public comment period has closed and that comments received, if any, do not require modification of, or withdrawal from, this Settlement Agreement by the United States. EPA anticipates that if no comments are received during the comment period on the notice under section 113(g), EPA would provide written notice to the Parties within 15 business days after the close of the comment period indicating this Settlement Agreement has become effective. If comments are received on the notice under section 113(g), EPA anticipates that the Agency would provide written notice to the Parties within 90 days after the close of the comment period, indicating whether the comments received require modification of, or withdrawal from, this Settlement Agreement by the United States, or whether this Settlement Agreement has become effective.

10. The undersigned representatives of the Parties certify that they are fully authorized by their Parties to bind that Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 9.

11. The United States shall reimburse the Petitioners \$34,000 in full satisfaction of any claim for attorney's fees and costs that was or could have been asserted in connection with this Action. The United States' payment shall be made as soon as practicable after EPA provides written notice that this Settlement Agreement is effective pursuant to Paragraph 9.

**ON BEHALF OF THE UNITED STATES:**

JOHN C. CRUDEN  
Acting Assistant Attorney General  
Environment & Natural Resources Division

DATE: \_\_\_\_\_

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ATTORNEYS FOR RESPONDENT UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

**ON BEHALF OF ALL PETITIONERS:**

DATE: \_\_\_\_\_

\_\_\_\_\_  
SUZANNE S. DICKEY (La. Bar No. 23713)  
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ATTORNEYS FOR PETITIONERS

**ON BEHALF OF THE LOUISIANA  
DEPARTMENT OF ENVIRONMENTAL QUALITY:**

DATE: \_\_\_\_\_

\_\_\_\_\_  
J. DALE GIVENS  
Secretary  
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ATTORNEY FOR INTERVENOR  
LOUISIANA DEPARTMENT OF ENVIRONMENTAL  
QUALITY